

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY ONEAL JOHNSON,

Defendant and Appellant.

C086715

(Super. Ct. No. 16FE015230)

Defendant Anthony Oneal Johnson appeals from his conviction on numerous counts of committing lewd or lascivious acts on two minor victims. Defendant's sole contention on appeal is that his convictions for two counts of forcible lewd acts, counts eight and nine, must be reversed because there is a reasonable probability clerical errors on the various verdict forms for the charged acts and corresponding lesser included offenses confused the jury and resulted in unintelligible verdicts. Although we do not

condone the apparent lack of care taken with the challenged verdict forms, as we explain we see no prejudice resulting from the multiple clerical errors. Consequently, we affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *Forcible Lewd or Lascivious Acts*

The prosecution presented evidence at trial that defendant committed numerous lewd or lascivious acts on two minors, Q and U, over the course of several years. Relevant to this appeal, defendant offered 13-year-old Q \$100 in exchange for allowing defendant to anally penetrate him. Defendant was physically unable to penetrate Q's anus and used his thumb to do so instead. In the same episode, defendant licked Q's anus and touched his bare bottom and penis. Q got scared, said "no," and tried to get up, but defendant forced him back down. Q said "no" five times before defendant eventually stopped. At the time, Q was under the influence of alcohol and marijuana defendant had given him.

### *Verdict, Jury Instructions, and Closing Argument*

A jury found defendant guilty of 10 counts of committing a lewd or lascivious act upon a child under 14 years old (Pen. Code, § 288, subd. (a) [lewd act]; counts one-two, four-six, and sixteen-twenty),<sup>1</sup> one count of giving or selling, or offering to give or sell, marijuana to a minor, or inducing a minor to use marijuana (Health & Saf. Code, § 11361, subd. (a); count three), three counts of committing a lewd or lascivious act on a child under the age of 14 by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury (§ 288, subd. (b)(1) [forcible lewd act]; counts seven, eight, and nine), and six counts of committing a lewd or lascivious act on a child of 15 years where defendant was at least 10 years older than the minor (§ 288, subd. (c)(1) [age

---

<sup>1</sup> Further undesignated statutory references are to the Penal Code.

specific lewd act]; counts ten-fifteen). The trial court denied probation and sentenced defendant to an aggregate term of 55 years eight months in state prison.

Before the jury began deliberations, the trial court instructed it that defendant was charged with lewd act in counts 1, 2, 4, 5, 6, 16, 17, 18, 19, and 20, and read the elements of that crime. The court then instructed the jury: “The defendant is charged in Counts 7, 8 and 9 with a lewd or lascivious act by force or fear on a child under the age of 14 years in violation of Penal Code section 288, subdivision (b), subdivision (1)” and correctly read the elements of that crime, which we refer to as forcible lewd act.

The forcible lewd act underlying count seven was described in the amended information as “hand to victim’s butt”; count eight as “mouth to victim’s anus”; and count nine as “thumb to victim’s anus.”

The trial court also instructed the jury on lesser included crimes in general: “If all of you find that the defendant is not guilty of a greater charged crime, you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

“I will now explain to you which crimes are affected by this instruction. A violation of Penal Code section 288(a), as defined in CALCRIM 1110, is a lesser crime of a violation of Penal Code section 288(b) as alleged in Counts 7, 8, and 9.

“It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.” The court provided the jury with a copy of the instructions to take with them into the jury room.

After the trial court instructed the jury, the parties delivered their closing arguments. The prosecutor described the difference between lewd acts and forcible lewd acts: “288(b)(1), this is the same as a 288(a) except for an additional element, which is the use of force. Obviously, using force in the course of the molestation of a child is a

separate and distinct crime. If you use force in order to complete that act, more force than is necessary to actually do it, then you're guilty of a 288(b)(1). And so let's look at what the elements and what the People have to prove.

"The first is that the defendant willfully touched the child's body, bare skin or through the clothing. You will recognize that element from the [lewd acts] and the [age specific lewd acts]. In committing the act, the defendant used force. That is the distinction, that he used force, and I will talk about the force that he used in this case in just a moment.

"The defendant committed the act with the intent of arousing himself or the child. Again, the same element as in those other two charges. And that the child was under 14 years old at the time.

"The Counts 7, 8 and 9 are the [forcible lewd acts], and I want you to pay particularly close attention to those because it was clear during [Q's] testimony that some of this touching in fact he said he liked it, some of it he liked, but things changed. On that occasion when he put his thumb up his butt and said he was going to have anal sex with him, things changed. That time [defendant] used force, that time was much, much different."

#### *Verdict Forms for Forcible Lewd Act Counts*

For each of counts seven, eight, and nine, charging forcible lewd acts, the trial court provided the jury with three verdict forms: one to sign if the jury found defendant guilty of the charged offense (forcible lewd act); one to sign if the jury found defendant not guilty of the greater offense but guilty of the lesser (lewd act); and one to sign if the jury found defendant not guilty of either.

#### *Verdict Forms - Counts Eight and Nine*

Regarding the verdict forms provided for count eight, the jury signed only one form, the form for guilty of the greater offense of forcible lewd act. The signed form read: "We the jury . . . find the defendant . . . **GUILTY** of committing a lewd or

lascivious act on a child under the age of 14 years by force, violence, duress, menace or fear of bodily harm, [Q], mouth on victim's anus, in violation of Penal Code section 288(a), on or about and between March 15, 2013 and March 14, 2015." The description of the crime on the verdict form matched the conduct described by the amended information, and the description of the statute matched the charged statutory subdivision, but the statutory subdivision itself was incorrect, reflecting subdivision (a) rather than (b)(1) of section 288.

The *unsigned* guilty form (for the lesser) also contained errors, reading: "Having unanimously found the defendant not guilty of a lewd or lascivious act by force, violence, duress, menace or fear of bodily harm, we the jury find him **GUILTY** of committing a lewd or lascivious act on [Q], hand on victim's butt, in violation of Penal Code section 288(b)(1), on or about and between March 15, 2013 and March 14, 2015, a lesser included offense." The act specified in this form, hand on butt, was different from the act specified in the signed guilty verdict form and the amended information for count eight, mouth on anus, and while the description of the statutes was correct, the statutory basis for the lesser crime was incorrectly listed as in the signed form. Nor did this form include the word "Lesser" in its caption.

The unsigned "not guilty" form correctly described the statute, listed the correct statutory subdivision, and correctly described the charged conduct.

Regarding count nine, the jury signed only one form, reading: "We the jury . . . find the defendant . . . **GUILTY** of committing a lewd or lascivious act on a child under the age of 14 years by force, violence, duress, menace or fear of bodily harm, [Q], thumb in victim's anus, in violation of Penal Code section 288(a), on or about and between March 15, 2013 and March 14, 2015." The description of the crime on the verdict form matched the conduct described by the amended information, and the description of the statute matched the charged statute, but the statutory subdivision was again incorrect, reflecting subdivision (a) rather than (b)(1) of section 288.

The unsigned guilty form (for the lesser) also contained errors, reading: “Having unanimously found the defendant not guilty of a lewd or lascivious act by force, violence duress, menace or fear of bodily harm, we the jury find him **GUILTY** of committing a lewd or lascivious act on [Q], hand on victim’s butt, in violation of Penal Code section 288(b)(1), on or about and between March 15, 2013 and March 14, 2015, a lesser included offense.” The description of the criminal act, hand on butt, was different than the act described in the amended information, thumb in anus, and the statutory basis for the lesser crime was incorrectly listed as in the signed form, although the form correctly described the statutes. Nor did this form reference “Lesser” in its caption.

The unsigned “not guilty” form listed the correct statutory subdivision, correctly described the statute, and correctly described the charged conduct.

*Verdict Forms - Count Seven*

Regarding the verdict forms provided for count seven, the jury signed two forms: the forms finding guilt on *both* the greater and lesser offenses. This procedure was incorrect. But the forms themselves were correct in that they contained the correct statutory provisions of the greater and lesser offenses, were correctly titled, and correctly described the corresponding conduct charged in the amended information.<sup>2</sup>

#### *Open Court Verdict Proceedings*

When handing in the jury's verdicts, the jury foreperson informed the trial court there was a "duplicate on the one verdict," count seven. The court read the verdicts for counts 1 through 6, and it skipped count seven to be returned to later.

The trial court then read the text of the signed verdict form for count eight, described above. The court polled the jury, and no juror disagreed with the verdict. A similar procedure recorded the verdict for count nine. The verdicts for counts 10-20 were read, polled, and recorded.

Returning to count seven, the trial court informed the jury that it had signed the verdict form for both the greater and the lesser offenses. The court asked the foreperson whether the jury intended to sign the verdict form finding defendant guilty of the charged offense and not the lesser offense. The foreperson stated that was the jury's intent, and each juror agreed.

---

<sup>2</sup> The greater offense verdict form read: "We the jury . . . find the defendant . . . **GUILTY** of committing a lewd or lascivious act on a child under the age of 14 years by force, violence, duress, menace or fear of bodily harm, [Q], hand on victim's butt, in violation of Penal Code section 288(b)(1), on or about and between March 15, 2013 and March 14, 2015." The lesser offense verdict form read: "Having unanimously found the defendant not guilty of a lewd or lascivious act by force, violence duress, menace or fear of bodily harm, we the jury find him **GUILTY** of committing a lewd or lascivious act on [Q], hand on victim's butt, in violation of Penal Code section 288(a), on or about and between March 15, 2013 and March 14, 2015, a lesser included offense." Also, the verdict form for the lesser offense in count seven included the word "Lesser" in the caption.

## DISCUSSION

Defendant contends his convictions for counts eight and nine must be vacated because errors on the verdict forms render the jury's intention unclear, in violation of his constitutional rights to "fundamental fairness, due process, and a jury trial." Specifically, defendant argues the errors in the verdict forms for counts eight and nine "could reasonably be expected to cause . . . cognitive dissonance and significant confusion as to the issues for determination" on the two counts and whether each verdict form was to be used for the greater or lesser offense. (Footnote and italics omitted.) Defendant asserts it is reasonably probable he would have obtained a more favorable result absent the errors in the verdict forms. The People contend defendant's claim is forfeited because defendant did not object to the wording of the verdict forms. In the alternative, the People argue the clerical error should be disregarded because the jury's intent to find defendant guilty of forcible lewd acts was unmistakably clear. We agree with both points but review his claim on the merits.

A defendant's failure to object to a verdict form when the court proposed to submit it or when the jury returned its finding forfeits the issue on appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 330 [defendant forfeited claim of error related to verdict form that contained incorrect code section reflecting prior serious felony conviction on a section 667, subdivision (a) finding].) But a reviewing court "may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259; see *People v. Osband* (1996) 13 Cal.4th 622, 689 [pursuant to section 1259, a "claim of instructional error may be considered for first time on appeal if 'the substantial rights of the defendant were affected' by the asserted error"].) Here, defendant acknowledges he did not object to the asserted defects in the challenged verdict form, but he claims the errors affected his substantial rights. We assume for the sake of argument that the many



errors in the verdict forms had the potential to affect defendant's substantial rights and will therefore consider his appeal on the merits.

“ ‘[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.]’ [Citations.]” (*People v. Camacho* (2009) 171 Cal.App.4th 1269, 1272-1273.) “ ‘A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court.’ [Citations.]” (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1256.) The jury's intent may be determined with reference to the information and the court's instructions to the jury. (*People v. Paul* (1998) 18 Cal.4th 698, 707.)

Here, despite the apparent lack of care taken in preparing and reviewing the verdict forms, we have no difficulty determining the jury intended to find defendant guilty of forcible lewd acts as charged in counts eight and nine. First, the signed verdict forms for counts eight and nine specifically state the jury found defendant guilty “of committing a lewd or lascivious act on a child under the age of 14 years *by force, violence, duress, menace or fear of bodily harm . . .*” (Italics added.) Though the verdict forms refer to the statutory subdivision for the lesser (a), rather than the greater (b)(1), there is no reason to believe that the jurors focused on the cite to the statute rather than the language of the charge itself. Further, in addition to the language we emphasized above, the signed verdict forms for counts eight and nine each contained a correct description of the charged behavior for each count. The sole error on both signed forms was in the citation to the incorrect subdivision of section 288.

Second, the jury was well-instructed and adequately informed. The trial court instructed the jury on the elements of the greater and lesser charges, specified which counts charged violations of each statute, and explained to the jury the law regarding lesser included crimes. The prosecutor described in detail the alleged offenses and the corresponding counts during closing argument. The prosecutor described the elements

required to prove the greater and lesser charges and the differences between the two statutes. The prosecutor also correctly identified which counts were charged as forcible lewd acts. There is no signal that the clerical errors in the verdict forms confused the jury in any way, unlike the demonstrated confusion with the two verdict forms for count seven.

Third, when discussing count seven and the associated verdict forms in open court with the judge, the jury unequivocally expressed its intent to find defendant guilty of forcible lewd acts. Count seven alleged hand to bottom contact between defendant and the victim, in the same episode during which counts eight and nine alleged mouth to anus and thumb to anus contact, respectively, all while defendant was using force to prevent Q from getting up. While not dispositive, the fact that the jury found defendant guilty of one part of the criminal episode in count seven and expressly confirmed that intention in open court strongly supports the inference the jury also intended to find defendant guilty of the continuation of the course of conduct described by counts eight and nine. Had the jury not believed defendant used force or fear during that incident, or had the jury found Q generally not credible, it would not have found defendant guilty as charged in count seven.

Under these circumstances, the jury clearly intended to do what it did--despite the citation error--and that was to find defendant guilty of forcible lewd acts as charged in counts eight and nine. Therefore, we conclude defendant's substantial rights suffered no prejudice, and for the same reason, the flaws in the verdict forms are harmless beyond a reasonable doubt.

### **DISPOSITION**

The judgment is affirmed.

/s/  
Duarte, J.

We concur:

/s/  
Blease, Acting P. J.

/s/  
Hull, J.